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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

WILLIAM JOSEPH RUSSO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To The Honorable, Chief Justice and Associate Justices Of The Supreme Court of The United States:

Your petitioner, William Joseph Russo, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit.

JUDGMENT AND OPINION OF THE COURT BELOW

On August 6, 1964, the United States Court of Appeals for the Seventh Circuit, by a 2 to 1 decision, affirmed a judgment of conviction entered in the United States District Court for the Northern District of Illinois. The case is reported at 335 F. 2d 299, and is appended herewith as Appendix "A".

JURISDICTIONAL STATEMENT

On a jury trial, defendant was convicted of receiving wagers and willfully failing to register and file a return with the Internal Revenue Department in violation of Section 7203, Title 26, U.S. Code.

On appeal, the judgment was affirmed, 335 F. 2d 299. A timely petition for rehearing *en banc* was denied on September 11, 1964. (Appendix B).

The jurisdiction of this court is invoked under the provisions of Section 1254 (1) Title 28, U.S. Code.

QUESTIONS PRESENTED FOR REVIEW

1. Was the statutory requirement under Section 7203, Title 26, U.S. Code that a wilful failure to file a return with the Director of Internal Revenue satisfied when the government failed to produce any proof that defendant was aware of the law requiring him to file such a return?

2. Were the totality of circumstances here such that the jury could properly infer that defendant knew of the existence of the facts when:

   (a) Defendant was observed taking a few $2 bets at a race track from different individuals; and

(b) When arrested and asked if he had a "wagering tax stamp" by the agent, defendant replied, "I don't know what you are talking about"?

3. Where the trial court found that the testimony of the agent was ". . . that he (defendant) did not know anything about the law, isn't that right, the wagering tax stamp?" may the Court of Appeals hold that the trial court's interpretation of the statement was not binding on the jury?

4. Where the jury found the defendant not guilty under Count I charging the defendant with failure to pay a special tax for being in the business of accepting wagers, a violation of Section 4411, Title 26 U.S. Code, may the same jury find the defendant guilty under Section 4412, Title 26 U.S. Code requiring registration with the Internal Revenue District in the event such person was required to pay a special tax?

STATUTES INVOLVED

Sections 4411, 4412, and 7203, Title 26 U.S. Code. (Relevant portions set out in Appendix "C")

STATEMENT OF THE CASE.

On four separate days, August 20, 21, 23 and 24, 1963, an Internal Revenue agent observed the defendant engaged in conversations with various individuals and saw currency passing from the individuals to the defendant who would then make notations on a piece of paper (A. 3-5).[1] On August 20, 1963, the agent gave defendant $4 and said he wanted the No. 7 horse in the sixth race. Defendant said, "No. 7, 2 and 2" and made some notations on a piece of paper. On August 21 and August 23, the agent gave the defendant $6 and $10 respectively.

Internal Revenue agent Pollitz testified that at the time of defendant's arrest on August 24, 1963, "He (the defendant) was asked if he had a wagering tax stamp". The agent said, "He replied he doesn't know. 'I don't know what you are talking about.' " (A. 6).

The agent advised the defendant of his constitutional privilege not to answer questions, and the defendant refused to answer any further questions (A. 6-7).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The question which this case poses is a recurring one and is one which has vexed the lower courts.

In substance, the question is whether or not a defendant may be found guilty of wilful failure to register under the gambling tax laws, Section 7203, Title 26, U.S. Code, where the only proof made by the government is that the defendant received some wagers on a few occasions.

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[1]A. refers to Appellant's Appendix.

The evidence here supports the government's contention that the petitioner was engaged in receiving wagers on horses. Taking the government's proof in its best light, the petitioner must concede that portion of the government's case. But there is no stealth here, no furtiveness, no large operation, and no concealment of activities. The defendant even took a bet from a stranger, agent Wheeler, whom the defendant had never seen before (A. 3-4).

The only evidence that bore upon the petitioner's knowledge of the requirement to obtain a wagering tax stamp is contained in the conversation which Internal Revenue Agent Pollitz had with the Petitioner at the time of petitioner's arrest. The government attorney asked whether there was any conversation with the defendant at the time of the arrest. Agent Pollitz advised the court and jury, "He was asked if he had a wagering tax stamp and the defendant replied, 'I don't know what you are talking about.'" (A. 6).

Section 7203, Title 26 U.S. Code makes it a crime only if a person ". . . wilfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information at the time or times required by law or regulations . . ."

Judge John R. Brown dissenting in *Edwards* v. *United States*, 334 F.2d 360, 5 Cir. (1964) stated, p. 368, "Congress can, of course, prescribe that the failure to pay the tax is a crime and thus eliminate the element of a *knowing* duty to pay. But as long as *Spies* v. *United States*, 1943, 317 U.S. 492, 63 S. Ct. 364, 87 L.ed. 418; *Hargrove* v. *United States*, 5 Cir. 1933, 67 F.2d 820, 90 ALR 1276; and *Wardlaw* v. *United States*, 5 Cir., 1953,

203 F.2d 884, stand, I do not think we may read out *knowledge* by a so-called presumption, rebuttable or otherwise, that an accused knows the law and knowing the laws knows he had a duty to pay." (Emphasis in the Opinion).

In the dissenting opinion in this case, Judge Schnackenberg agreed with Judge Brown, stating, 335 F.2d 299, 302:

> "I find no evidence in the record of wilfulness in defendant's failure to register and file a return. While it was his duty to do so and we can, momentarily indulge in the aphorism that everyone is presumed to know the law, yet the act, in its definition of the offense says '*wilfully* fails to . . . make such return' (Italics supplied)" (Emphasis in the Opinion).

The dissenting judge further pointed out, p. 303, that "a significant thing about this record is that there is no evidence that defendant *did know* what the agent was talking about. Certainly, this case lacks any proof showing that defendant knew there was a federal law requiring him to make a return." (Emphasis added).

Edwards v. *United States,* 334 F.2d 360, 5 Cir. (1964) in an *en banc* decision, 4 to 3, reversed on the government's petition for rehearing the earlier holding in *Edwards* v. *United States,* 321 F.2d 324, which decided by a 2 to 1 vote to reverse the judgment of conviction for lack of proof that defendants had knowledge of the requirement to pay the special tax.

The majority in the second *Edwards* decision pointed out, 334 F.2d at 365, that Frank Edwards was arrested for a bolita lottery offense previously, that he used his house to carry out his gambling operations, that he accepted packages at night in a parking lot behind a bar,

that he hid the can containing lottery paraphernalia under the house next door, that he carried paper sacks under his shirt and that he retrieved paper sacks left for him in the mail box.

The majority opinion in the instant case does not point out nor does it demonstrate the circumstances in the case by which the jury could properly infer that the failure to register on the part of the defendant here was wilful, as required by the statute.

It is unique here that the defendant was found not guilty under Count I, which charged the defendant with wilfully failing to pay the tax on wagers, but found him guilty under Count II charging a wilful and knowing failure to register and file a return in violation of the same section 7203, Title 26 U.S.C., which required the defendant to pay the tax.

What is "wilful" when applied to the gambling tax act? In *Spies* v. *United States*, 1943, 317 U.S. 492, 497, 498, 63 S.Ct. 364, 367, 87 L.Ed. 418, this Court stated:

> "The difference between wilful failure to pay a tax when due which is made a misdemeanor, and wilful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. Both must be wilful, and wilful, as we have said, is a word of many meanings, its construction often being influenced by its context."

What circumstantial evidence permits a finding that defendant was wilful in failing to register under the section here involved? In *Ingram* v. *United States*, 360 U.S. 72, 79 S.Ct. 1314, 3 L.Ed. 2d 1503 (1959), there was no direct evidence to show that any of the four defendants

knew of the tax and registration requirements. The evidence showed that as to two of the defendants they had been the principals in a large scale numbers operation conducted over a period of years in the City of Atlanta, while the two other defendants were minor clerical personnel employed by the organization that conducted the gambling operation. Upholding the convictions of *Ingram* and *Jenkins*, this Court reversed as to the other two defendants, Smith and Law, holding that there was insufficient proof that they knew of the liability of their superiors for the taxes. Such circumstances as "the intimate connection of Smith and Law with the operation of the lottery itself, their cooperation in conducting it secretly, and their apparent knowledge that it was conducted at a profit," were held to be "colorless as to the vital issue of knowledge on the part of Smith and Law that their superiors owed federal wagering taxes."

Recognition that there must be more than evidence of simple gambling operations before criminal liability is imposed under the section here involved is seen in *United States* v. *Chramek*, 331 F.2d 380, 4 Cir. (1964) where the conviction of a horse-race bookie taking bets over the telephone was sustained on evidence of the gambling activity ". . . together with his admission that he knew of his liability for the occupational tax and that he had not paid it for fear of exposing himself to prosecution by local officers . . ." p. 382.

CONCLUSION.

We respectfully submit that the petition should be allowed in order to decide whether mere evidence of gambling activity, such as here, without more, satisfies the Congressional requirement that the defendant be proved guilty of *wilful* failure to register under the gambling tax law.

Respectfully submitted,

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